

DRAFT
Government-Industry Advisory Panel
Tension Point Development

Original Title: *(3)(a) Data Rights as an Evaluation Factor*

Authors: *Charles Harris, James McEwen*

Tension Point: Source selections in the past often failed to include an evaluation factor for technical data or computer software (collectively, “data”), and the associated license rights (a.k.a. “data rights”), so the value of intellectual property in an innovative industry proposal was overlooked or not used to discriminate among proposals. A recent trend in source selections is to include provisions seeking a certain level of data rights, e.g., Government Purpose Rights, for all deliverable data, with no ability for industry to trade off the sought-after level of data rights for another benefit to the Government, such as reduced cost of a commercial product or increased innovation in the proposed solution. Industry perceives this trend as being an arbitrary use of competitive pressures to obtain unnecessarily broad licensing terms, which discourages industry investment and may be contrary to 10 USC 2320(a)(2)(H) or 15 USC 638(j)(2).

Discussion: It is an inherently governmental function for the Government to determine its requirements and to select the evaluation factors that it will employ during a source selection in order to reach the “best value” determination while ensuring such evaluation factors drive multiple offers in satisfaction of competition requirements. This concept has been confirmed repeatedly by the General Accountability Office in its bid protests decisions. To carry out their missions, and to meet certain statutory requirements (e.g. CICA), Government agencies require access to certain data either from an original equipment manufacturer (OEM) contractor or subcontractor, or generated from Government sources. Government agencies are required by statute to always evaluate price or cost during a source selection. Since two thirds of the price/cost of an item typically occurs in the sustainment phase of the acquisition, Government agencies need to identify the necessary data and Intellectual Property licenses in the necessary data, during a source selection and should be accounting for such Intellectual Property to accurately assess the total lifecycle cost/price of the item from each bidder in the competition.

DoD must respect the cutting-edge technology of innovative companies, particularly where the technology was developed with private investment. When a private company is not willing to share proprietary details regarding its technology with DoD, at any price, DoD may seek a different technical solution – one that enables organic or competitively-awarded life-cycle sustainment and modernization of the item.

The Panel has discussed that the Government cannot require the potential contractors to relinquish to the Government, as a condition of contract award, data rights greater than authorized by 10 U.S.C. 2320 or 15 USC 638(j)(2). Under these provisions, the Department cannot include a proposal or bid requirement that the winning contractor must grant the Government a broad license, such as Government Purpose Rights, when the statutory regimes would allow the contractor to assert a more restrictive license, such as Limited Rights, Small Business Innovation Research (SBIR) data rights, or commercial license rights. The Panel

DRAFT

Government-Industry Advisory Panel
Tension Point Development

reviewed the history of 10 U.S.C. 2320, which was enacted, in part, to protect industry from certain Department practices which industry believed discouraged industry investment incentives and competition. Industry members also noted to the Panel that even expressing a preference for specific DFARS-defined license rights may chill competition. The industry Panel members support an expansive interpretation of the concepts included in 10 U.S.C. 2320(a)(2)(H) or 15 USC 638(j)(2), which they perceive as encouraging competition and private investment.

The Panel has also discussed the Department's needs to find a way to evaluate the data licenses each offeror proposes for a contract, and notes that 10 U.S.C. 2305 discusses the use of evaluation of data licenses in specific situations. According to the Government members, the correct balance is to allow evaluation of each offeror's data deliverables and associated licenses during source selection, which may provide a better value for the Government and, since the offerors are voluntarily proposing the data licenses, the Government is not forcing a particular offeror to give up any license rights in violation of 10 U.S.C. 2320(a)(2)(H) or 15 USC 638(j)(2).

Industry has previously proposed that DoD be prohibited from evaluating a contractor's proposal based on the contractor's willingness to relinquish greater rights than the Government is entitled to require under the law. This proposal was born of practices which industry believes effectively devalued IP to the extent that it deters private investment in military technologies, and also increased bid and proposal prices with little benefit.

The Panel notes that past source selections often failed to include an evaluation factor for data deliverables, and associated data rights, so the value of intellectual property in an innovative industry proposal may be overlooked or not used to discriminate among proposals. In other source selections, the *quantity*, instead of the *quality*, of data deliverables and data rights is evaluated, which may result in 1) a more expensive solution in terms of total life cycle costs, and 2) a less innovative solution being offered and selected instead of more innovative, commercial or proprietary, solutions that deliver less data and data rights but provide substantially greater cost savings over the acquisition life cycle.

The Panel also discussed one recently used model where the evaluation factor assigned a monetary value that reduced the total evaluated price of offers that provided at least Government Purpose Rights for a set of listed components. Under this model, offerors received a benefit for ensuring the Government received license rights to allow the data to be used for competitive life-cycle support, and the offeror was effectively given a competitive benefit if it offered the sought-after license right. The Panel noted that such an example has potential downsides since lower-tier suppliers (especially those providing commercial or entirely privately developed technologies) are unlikely to agree to such terms even if the prime offeror is willing; if there are lower-tier supplier exceptions, the evaluation scheme provides greater rights from vertically integrated companies who use fewer suppliers which is not considered in the evaluation factor; and the evaluation factors need to account for the actual value received as

DRAFT

Government-Industry Advisory Panel
Tension Point Development

compared to the default rights. The model highlights the issues which need to be balanced to ensure best value for the Government and fairness to the offerors.

The Panel further notes that the Department of Defense has failed to provide uniform source selection procedures for the evaluation of data deliverables and data rights, preferring instead to leave this decision with program personnel who can tailor requirements to the needs of individual programs. The Panel is also concerned that there is a lack of DoD-level or agency-level oversight of these individually-tailored source selections. The Panel believes that Department of Defense source selections should consistently communicate the Government's acquisition and sustainment requirements in clear, meaningful ways to encourage Industry to propose the best possible array of noncommercial and commercial solutions (including intellectual property). In turn, this allows the Government to make meaningful distinctions amongst those disparate proposals, and ensure that the award represents the best value to the Warfighter and the Nation. The Department has also not evaluated the increased bid and proposal costs associated with complex evaluation factors, and has also not provided guidance on Intellectual Property valuation techniques which allow the evaluation factors to bear a meaningful relationship to the market value of the data licenses to prevent over or under payment for such licenses. The Department has also not provided guidance on when such evaluation factors might not be appropriate, such as where source selection is by other than best value involving trade-offs (e.g., IP may be harder to evaluate or discriminate meaningfully when using lowest price technically acceptable procedures). The Department has also not provided guidance on engaging offerors to receive counter proposals which may result in improved technical data packages with license rights tailored to the Government's actual needs, as opposed to using Government Purpose Rights as the only possible choice.

DoD should not adopt a "one size fits all" approach to intellectual property evaluation in source selections. Clear criteria to meaningfully discriminate between offers using data licenses as an evaluation factor should be provided to offerors, such as reduced cost and schedule of development from commercially available items, or reduced sustainment costs when the Government receives sufficient data deliverables and data rights for organic sustainment, the IP valuation techniques used by the Government, and the analysis of the effect on cost/price due to the effects on competition caused by increased license requirement. Source selections should be carefully structured to avoid "paying more than once for" the value of intellectual property and should be structured in a way that does not devalue industry's ability to provide innovative solutions.

The Panel believes industry feedback should be actively encouraged on evaluation factors and the Government should incorporate the feedback to ensure the factors represent the best value to the Department for a given solicitation as informed by the IP Strategy adopted by the program under DoD Instruction 5000.02. The offerors should provide a detailed discussion of their IP valuation techniques and assumptions and should also be made aware of any formulas used by the Government in calculating the evaluation factors which often reveal subtle preferences offerors need to be aware of to meet the Department's needs. Industry's view is the lack of pre-

DRAFT
Government-Industry Advisory Panel
Tension Point Development

award protest is not indicative of the appropriateness or effectiveness of the evaluation factors. Post award, Government debriefings should provide offerors the key aspects of how their offer was evaluated under the evaluation factor using the same formulas and assumptions used for all proposals in order to have meaningful feedback.

Recommendation:

The Panel recommends no change to 10 U.S.C. 2320 or 10 U.S.C. 2321 to address this issue.

The Panel also recommends a new section in the FY18 NDAA, section 8xx regarding a pilot program for IP evaluation in acquisition planning and source selection regarding certain Major Defense Acquisition Programs, as follows:

FY18 NDAA, section 8xx PILOT PROGRAM ON INTELLECTUAL PROPERTY EVALUATION FOR MAJOR DEFENSE ACQUISITION PROGRAMS

(a) PILOT PROGRAM.— Not later than 180 days after the date of enactment of this act, the Secretary of Defense and the Secretaries of the military departments may jointly carry out a pilot program to assess mechanisms to evaluate intellectual property (e.g. technical data deliverables and associated license rights), including commercially available intellectual property valuation analysis and techniques, in the major defense acquisition programs for which they are the milestone decision authority to better understand the benefits associated with these techniques on—

- (1) The development of cost-effective intellectual property strategies, and
- (2) assessment and management of the value and costs of intellectual property during acquisition and sustainment activities (including source selection evaluation factors) throughout the acquisition lifecycle for any major defense acquisition program selected by the Secretary concerned.

(b) ACTIVITIES.—Activities under the pilot program may include the following—

- (1) Establishing a team of Department of Defense and private sector subject matter experts to identify, to the maximum extent practicable at each milestone for the selected major defense acquisition programs, intellectual property evaluation techniques to obtain quantitative and qualitative analysis related to the value of intellectual property during the procurement, production & deployment, and operations & support phases of the acquisition of the systems under the program.
- (2) Assessment of commercial valuation techniques for intellectual property for use by the Department of Defense.
- (3) Assessment of feasibility of agency-level oversight to standardize intellectual property evaluation practices and procedures.
- (4) Assessment of contracting mechanisms to speed delivery of intellectual property to the Armed Forces or reduce sustainment costs.

DRAFT

Government-Industry Advisory Panel
Tension Point Development

(5) Assessment of agency acquisition planning to ensure procurement of intellectual property deliverables and intellectual property rights necessary for Government-planned sustainment activities.

(6) Engagement with the commercial industry to—

(A) Support the development of strategies and program requirements to aid in acquisition and transition planning for intellectual property;

(B) Support the development and improvement of intellectual property strategies as part of life-cycle sustainment plans; and

(C) Propose and implement alternative and innovative methods of intellectual property valuation, prioritization, and evaluation techniques for intellectual property.

(7) Recommend to the cognizant program manager for a major defense acquisition program such evaluation techniques and contracting mechanisms for implementation into the acquisition and sustainment activities of that major defense acquisition program.

(c) ACQUISITION OF COMMERCIAL, SBIR-DEVELOPED, AND NONDEVELOPMENTAL ITEMS, PRODUCTS, OR SERVICES. – The Pilot Program shall provide criteria to ensure the evaluation of Small Business Innovation Research (SBIR)-developed products, commercial items, and nondevelopmental items are appropriately considered against items to be specifically developed for the major defense acquisition program and the benefits of reduced risk regarding cost, schedule and performance of commercial, SBIR-developed, and nondevelopmental items, products, or services are appropriately valued.

(d) ASSESSMENT. —Not later than one year after the commencement of the pilot program, and annually thereafter through 2023, the Secretaries concerned shall provide on July 1st of that year through the Secretary of Defense to the congressional defense committees a joint report on the pilot program required under paragraph (a) of this section. The report shall, at a minimum, include, —

(1) A description of the major defense acquisition programs selected by the Secretary concerned;

(2) A description of the specific activities in paragraph (b) that were performed under each program;

(3) An assessment of the effectiveness of the activities;

(4) An assessment of improvements to acquisition or sustainment activities related to the pilot program; and

(5) An assessment of cost-savings from the activities related to the pilot program, including any improvement to mission-success during the operations & support phase of the program.

(e) AVAILABILITY OF FUNDS.— The Secretary of Defense and the Secretaries of each of the Military Departments are authorized to expend funds to carry out the pilot program in paragraph (a) from funds authorized and appropriated to the Department of Defense for fiscal years 2018 through 2023.

DRAFT

Government-Industry Advisory Panel
Tension Point Development

(f) SUNSET.- The authority to carry out the pilot program under this section shall expire on September 30, 2023.

The Panel recommends the Department draft regulations to be implemented when using intellectual property as an evaluation factor which reflect a common set of principles and procedures for competitive source selections. Such principles should include:

- Use is avoided in source selections when there is limited ability to meaningfully discriminate between varying intellectual property proposals (e.g., IP may be harder to evaluate or discriminate meaningfully when using lowest priced technically acceptable procedures).
- Transparency to all offerors as to the evaluation factors and the calculation of the data rights license value affecting the evaluation factors based on identified valuation techniques.
- Ensuring such evaluation factors do not unnecessarily limit commercial and non-commercial competition, and are in compliance with the spirit of 10 U.S.C. 2320(a)(2)(H), 15 USC 638(j)(2), and 10 USC 2305.
- Ensuring the evaluation factors allow for multiple license rights offerings to meet specified Government objectives for the use of such data, including requirements for Modular Open Systems Approaches, interfaces, and long term sustainment and upgrade needs at specific locations and agencies.
- Ensuring such evaluation factors account for commercial items, SBIR products, and supply chain issues in requiring specific license rights.
- Ensuring such evaluation factor shall consider only license rights DoD actually needs to perform its mission, to ensure return on its technology development investments, and to account for the Government's existing licenses to prevent effectively paying twice for the same IP.
- Ensuring the valuation of rights when used in an evaluation factor shall be assessed in accordance with best practices and consensus based standards and norms, by DoD personnel having received extra training in valuation techniques or are experts in the field of IP valuation.

The Panel recommends such factors be incorporated into the DFARS, and DoD establish a panel of IP valuation and financial analysis experts within DoD to determine (or to vet methodologies used to determine) relative values of sustainment solutions and intellectual property rights over a product's life cycle to aid in evaluating such factors.

The Panel recommends DFARS 212 and DFARS 215.506, respectively, include a new section on debriefings for evaluation factors which evaluate data rights licenses. The new section needs to ensure offerors are given full access to proposal neutral facts used by the Government and applied to all the offers for the same evaluation factor, including any formulas and valuation assumptions used by the Government in such evaluations.

DRAFT

Government-Industry Advisory Panel
Tension Point Development

The Panel recommends an update to the guidance in Defense Acquisition Guidebook at <https://dag.dau.mil/> and Department of Defense Source Selection Procedures to recognize and reinforce the necessity to use, when appropriate, intellectual property, as an evaluation factor. Mandate that DoD component (e.g., DARPA, Army, Navy, Air Force) guidance on source selection be updated accordingly. The Panel recommends that the Department obtain, post award from offerors, information on the amount of time and effort required to comply with proposal evaluation factors based on intellectual property, and update this guidance to minimize the impact.

Cross-reference to other Tension Points:

- (3)(b) IP Valuation Versus Evaluation Factors and Priced CLINS